***THE HONOURABLE SRI JUSTICE B. SUDERSHAN REDDY**

AND

***THE HONOURABLE SRI JUSTICE RAMESH RANGANATHAN**

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+ WRIT PETITION No. 6460 of 2005

% 02.09.2005

M/s Ankit Packaging Limited, Rep.,by its Managing Director, M.L.Agarwal, S/o Late D.P.Agarwal, 177, Bowenpally, Secunderabad.

… Petitioner

and

.

$ The Additional Commisioner (CT) (Legal)

Office of The Commissioner of Commercial Taxes, Nampaly, Hyderabad.

RESPONDENT

! Counsel for the Petitioner: Sri D.Srinivas

^ Counsel for the Respondent : Sri A.V.Krishna Koundinya, S.C. for respondent

< Gist:

> Head Note:

? CITATIONS:

[1] AIR 1985 SC 703

[2] Volume 19 (1967) STC 267

[3] Volume 37 (1976) STC 425 (SC)

[4] Volume 122 (2001) STC 32

[5] Volume 10 (1959) STC 524

[6] Volume 24 (1997) A.P. Sales Tax Journal 247

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THE HON'BLE SRI JUSTICE B. SUDERSHAN REDDY

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WRIT PETITION No.6460 of 2005

JUDGMENT: (per Sri Ramesh Ranganathan,J)

The revised show cause notice, in CCT's Ref.L.III(2)/2270/2003 dated 1-3-2005, issued by the Additional Commissioner (CT – Legal), Hyderabad, whereby the respondent, (on finding that the set off tax of Rs.3,73,739/- allowed by the Appellate Deputy Commissioner earlier, was prejudicial to the interest of the revenue), proposed to disallow the set off, in revision, is impugned in this writ petition, as without jurisdiction.

The facts, to the extent necessary for the purpose of this writ petition, are that the petitioner, a registered dealer on the rolls of the Commercial Tax Officer, Marredpally Circle, manufactures flexible packaging material. For the Assessment year 1997-98, the Commercial Tax Officer passed final assessment orders on 31-3-2001, assessing the petitioner on a net turnover of Rs.2,42,79,770/-. Aggrieved by the assessment order, the petitioner preferred an appeal, (Appeal No.P/88/2001-2002), to the Appellate Deputy Commissioner (CT), Punjagutta Division, Hyderabad wherein he disputed (1) forfeiture of tax of Rs.7,82,948/- and (2) disallowance of set off of tax of Rs.3,73,739/-. The Appellate authority, by order dated 19-6-2001, allowed the appeal, granted relief to the petitioner on both the aforesaid items and thereafter the assessing authority passed consequential orders on 10-7-2001 giving effect to the order of the Appellate Authority.

The Respondent issued show cause dated 23-3-2004 purporting to revise the order of the appellate authority dated 19-6-2001, in respect of one of the two items, relating to forfeiture of excess collection of tax by the petitioner. In reply thereto the petitioner filed its written objections on 26-5-2004. The Revision was posted on 1-6-2004 on which date the petitioner's counsel attended the hearing and made his submissions. However, no orders were passed by the respondent in the said revision.

A second show cause notice was issued by the respondent on 1-3-2005 proposing to revise the order of the Appellate Deputy Commissioner dated 19-6-2001 for the second item also i.e., set off of tax of Rs.3,73,739/-. This second show cause notice, dated 1-3-2005, is the subject matter of challenge in the present writ petition, on the ground that the respondent lacks jurisdiction to twice revise the very same order of the Appellate Deputy Commissioner dated 19-6-2001, that too on the same set of facts.

A counter affidavit is filed by the respondent wherein it is stated that the writ petition, against the show cause, is premature and is not maintainable. It is also stated that for the assessment year 1997-98, the assessing authority, while passing the assessment order on 31-3-2001, had forfeited an amount of Rs.7,82,948/-, being the excess tax collection made by the petitioner from their customers, since excess collection of tax is contrary to the provisions of the Andhra Pradesh General Sales Tax Act, 1957 (APGST Act), an offence under Section 30 and liable for forfeiture under Section 39 (c) of the APGST Act. The assessing authority had also refused to grant set off of tax of Rs.3,73,739/- in the light of G.O.Ms.No.547 dated 9-6-1987, since benefit under the said G.O., is restricted to cases of goods falling under Entry 186 of the First Schedule from out of which goods, falling under Entry 187, are manufactured and sold. In such cases, tax paid on the goods under Entry 186 are required to be given set off from the tax payable on goods manufactured and sold under Entry 187.

It is stated that since the appellate authority had, by his order dated 19.06.2001, allowed the appeal in toto for both the aforesaid items, the previous Additional Commissioner had issued show cause notice on 23.03.2004 proposing to revise the said order of the Appellate authority on the issue of forfeiture of Excess Tax collection and that the petitioner had filed its objections thereto on 26-5-2004. It

is further stated that the deponent of the counter affidavit took charge of the post of the Additional Commissioner (CT) on regular basis on 3-2-2005 and on perusal of the file found that his predecessor had, by oversight, not included the item relating to set off in the show cause notice of revision dated 23.03.2004. Since G.O.Ms.No.547 dated 9-6-1987 did not contemplate any set off on the deemed sale of finished goods, and since authorities under the Act, while interpreting the provisions of the Act and the notifications issued thereunder, were required to strictly abide by its language, and not give scope for intendment, a second revised show cause notice was issued by him on 1-3-2005, incorporating the item of set off, for revision. Challenge to the show cause notice dated 1-3-2005, without the petitioner submitting its objections thereto, is contended as an abuse of process of this court. It is stated that the earlier show cause notice for revision dated 23-3-2004 did not discuss the merits of the issue of set off and therefore the revised show cause notice dated 1-3-2005, proposing to tax the set off turnover, does not amount to any change of opinion in revising the order. It is stated that since no conclusion had been reached pursuant to the first show cause notice for revision, there is no prohibition in initiating proceedings to revise the order on another ground.

We find no merit in the contention of the respondent that the present writ petition, filed against the show cause notice dated 01.03.2005, is premature and not maintainable. The impugned show cause notice dated 01.03.2005 is challenged as being passed without jurisdiction. If the petitioner's contention with regards lack of jurisdiction of the respondent, to issue the show cause notice, is found to be correct, the petitioner would then suffer grave prejudice and injury by an order passed without jurisdiction. Where the threat of a prejudicial action is wholly without jurisdiction, a person cannot be asked to wait for the injury to be caused to him before seeking the Court's protection. If, on the other hand, the respondent has the power, in law, to issue the notice, it would not be open to the petitioner to approach this Court under Article 226 of the Constitution of India at the stage of a show cause notice and in such an event his writ petition would be said to be premature. This contention however, cannot be decided at the threshold, and the matter requires examination to determine as to whether or not the respondent had to power or jurisdiction to issue the impugned show cause notice. **(Chief of Army Staff Vs. Major Dharam Pal Kukrety).** If this Court comes to the conclusion that the respondent lacks jurisdiction, the impugned show cause notice dated 1-3-2005 would require to be set aside. If, on the other hand, it is found that the respondent

had the power to issue the show cause notice, the petitioner would then be required to submit its reply thereto enabling the respondent to consider and pass appropriate orders on merits.

Sri D.Srinivas, learned counsel for the petitioner, submits that the show cause notice dated 1-3-2005 is without jurisdiction, as no new facts have come to light after issuance of the first show cause notice on 23.03.2004 and it is not permissible, under law, to exercise revisional powers, under the statute, more than once, to revise the very same order on the same set of facts. It is contended that there is no provision under the APGST Act to revise the order item wise at different times in a piecemeal manner, that the change of the authority or officer is not a ground to revise the order of the lower authority, that since the earlier Additional Commissioner, on going through the entire record, had found that the order of the appellate authority was prejudicial to the interest of revenue in respect of one item, relating to excess collection of tax, it is deemed that the other item, relating to set off of tax, was found to be correct by the then revisional authority, and that mere change of office, without there being any new facts on record, did not empower revision proceedings being initiated on the second item also. Learned counsel, placing reliance on the judgments in **"S.Subba Rao Vs. Commissioner of Commercial Taxes"** (Mysore High Court Division Bench); **"S.B.Gurbaksh Singh Vs. Union of India"** (Supreme Court) and **"Khimijibhai Mills Vs. Additional Commissioner of Commercial Taxes, Belgaum Zone"** (Full Bench of Karnataka High Court), would submit that revision proceedings commence on the issuance of the show cause notice and end on the passing of the final order of revision. Reliance is placed, on two Division Bench judgments of this Court in **"Manepalli Venkatanarayna Vs. The State of Andhra Pradesh"** and **"State of Andhra Pradesh Vs. Sri Panduranga Rice Mill Contractors Co.,Gudlavalleru, Krishna District"**, in support of the submission that on issuance of a show cause notice, revisional powers are deemed to have been exercised and such revisional powers can be exercised only once and not repeatedly.

It is contended that on the first show cause notice, in revision, having been issued on 23-3-2004, revisional proceedings are deemed to have been initiated, and it is not open to the authorities to thereafter issue another show cause notice seeking

to revise the very same order of the Appellate Authority, albeit for another item. It is contended that a show cause notice is a proceeding or an order passed under the Act and that the respondent has no power to review his own proceedings/order under Section 20 of the APGST Act.

Section 20 of the APGST Act reads as under:

"Revision by Commissioner of Commercial Taxes and other prescribed authorities:

1. The Commissioner of Commercial Taxes may *suo motu* call for and examine the record of any order passed or proceeding recorded by any authority, officer or person subordinate to it, under the provisions of this Act, including sub-section (2) of this Section and if such order or proceeding recorded is prejudicial to the interests of revenue, may make such enquiry, or cause such enquiry to be made and subject to the provisions of this Act, may initiate proceedings to revise, modify or set aside such order or proceeding and may pass such order in reference thereto as it thinks fit.,

2. Powers of the nature referred to sub-section (1) may also be exercised by Additional Commissioner or the Joint Commissioner,. Deputy Commissioner and the Assistant Commissioner in the case of orders passed or proceedings recorded by authorities, officers or persons subordinate to them.

(2-A) The power under sub-section (1) or sub-section (2) shall not be exercised by the authority specified therein in respect of any issue or question which is the subject matter of an appeal before, or which was decided on appeal by, the Appellate Tribunal under Section 21.

(3) In relation to an order of assessment passed under this Act, the power conferred by sub-sections (1) and (2) shall be exercisable only within such period not exceeding four years from the date on which the order was served on the dealer, as may be prescribed.

(4) No order shall be passed under sub-section (1) or sub-section (2) enhancing any assessment unless an opportunity has been given to the assessee to show cause against the proposed enhancement.

(5) Where an order passed under this Section has been set aside by any Court or other competent authority under this Act for any reson the period between the date of such order and the date on which it has been so set aside shall be excluded in computing the period of four years specified in sub-section (3) for the purpose of making a fresh revision, if any, under this Section.

(6) Where any proceeding under this Section has been deferred on account of any stay order granted by the Special Appellate Tribunal in any case, or by reason of the fact that an appeal or other proceeding is pending before the Special Appellate Tribunal or the Supreme Court involving a question of law having a direct bearing on the order or proceedings in question, the period during which the stay order was in force or such appeal or proceeding which pending shall be excluded in computing the period of four

years specified in this Section for the purposes of exercising the power under this Section"

In **Subbarao's case** (**2**-supra), the question which arose for consideration was as to whether the revisional powers, under Section 21 of the Mysore Sales Tax Act, could be exercised by the Commissioner beyond the time limit of four years prescribed under the Act. The contention advanced was that the period of limitation has to be computed from the date of passing of the order, which is subject matter of revision, till the date on which the final order of revision was passed and not till the date on which proceedings have been initiated to revise the order and since the final order passed by the Commissioner in revision was beyond the period of four years, the order under revision was to be held as beyond limitation. The Division Bench of the Mysore High Court held that the power of the Commissioner, under Section 21 of the Mysore Sales Tax Act, included three different facets viz., 1). calling for the records mentioned therein; 2). Examination of those records, and 3) passing such orders, with respect thereto as the Commissioner though fit. The Division Bench held that the Commissioner begins to exercise his powers under Section 21(2) as soon as he calls for the records in question and that exercise of that power comes to an end on orders being passed in respect thereto. The Division Bench rejected the contentions advanced and held that the power to call for records under Section 21(2) was a part of the quasi judicial power of the Commissioner to revise the orders of his subordinates, and since the exercise of power, under Section 21(2), commences as soon as the records mentioned therein are called for, it is only if this Act, of calling for the records, is not under taken within the period of four years, would the question of limitation arise. Once this power is exercised within the period of four years, even if the final order is passed by the Commissioner beyond the period of four years, the order under revision cannot be said to be barred by limitation.

In the present case, it is not in dispute that, the impugned show cause notice dated 01.03.2005 is well within the four year period of limitation, prescribed under Section 20(3) of the A.P.G.S.T. Act calculated from the date of the order of the Appellate Deputy Commissioner dated 19.06.2001. The judgment in **Subbarao's case** (2-supra) has no application to the facts of the present case. The law laid down by the Mysore High Court in **Subbarao's** (2 supra) case was approved by the Full Bench of the Karnataka High Court in **Khimijibhai Mills case** (4-supra) holding that

Section 22-A of the Karnataka Sales Tax Act envisaged and provided for initiation of revision proceedings, by sending for the records only and would not include passing of the final order under Section 22-A as well.

In **Gurbaksh Singh's case** (3 supra) the question which arose for consideration before the Supreme Court was whether exercise of the power of the revision, under Section 20(3) of the Bengal Finance (Sales Tax) Act, 1941, as extended to the Union Territory of Delhi, was subject to the period of limitation provided in sub-section (2a) of Section 11 or Section 11-A of the said Act. The Contention urged in the said case was that the revisional authority was required to exercise the revisional power within the period prescribed, that in cases where the orders were other than remand, they could directly exercise the powers and in case the order was of remand for assessment, to the assessing authority, then also the orders were required to be passed within the same period. This contention was rejected and the Supreme Court held that it would be unjust and unreasonable to hold that the bar of limitation for assessment must also continue to run at all stages of proceedings including revisional proceedings. The Apex Court held that while the statute prescribed the time limit for the assessee to move in revision, no time limit had been prescribed for exercise of *suo motu* power of revision by the Commissioner and, for such exercise of *suo motu* power, the revisional authority had to initiate proceedings within a reasonable time, which would depend on the facts of each case.

No such difficulty however arises in the present case inasmuch as Section 20(3) restricts exercise of the power of revision, under sub-sections (1) and (2) of Section 20, to a period not exceeding four years from the date on which the order was served. It is not in dispute that, in the case on hand, the Commissioner had exercised the powers of revision within the statutorily prescribed period of limitation of four years.

Sri A.V.Krishna Koundiya, learned Special Standing counsel, appearing for the respondent, would submit that though the matter was heard on 1-6-2004, the revisional authority had not passed any order pursuant to the earlier show cause notice dated 23-3-2004 and it could therefore not be said that the order of the appellate authority dated 19-6-2001 has already been revised by the Additional Commissioner. Learned Special Standing Counsel would submit that, in the absence of any final orders being passed by the revisional authority, there is no prohibition against any other item, in the same order of the appellate authority, being

revised and a comprehensive order passed in revision by the Additional Commissioner. Learned counsel would submit that the judgment relied upon by the petitioner in **Panduranga Rice Mill's case**, (6-supra), is a case wherein a final order had been passed in revision and it was in such circumstances this Court held that a second revision, against the very same order, was not maintainable.

We find considerable force in this submission of the Special Standing Counsel. The first show cause notice proposing to revise the order of the appellate authority dated 19.06.2001 was issued by the respondent on 23.03.2004 in respect of one of the two items allowed by the appellate authority. While the petitioner, submitted written objections on 26.05.2005 and the matter was heard on 01.06.2005, no orders were passed in the revision pursuant to the show cause notice dated 23.03.2004. In the absence of any final order being passed, the earlier revision proceedings are deemed to continue and to have not attained finality.

In **Panduranga Rice Mills case,** (6-supra), a Division Bench of this Court held that once an order was passed in revision, the Commissioner did not have the power to revise the order of assessment for a second time even if it be on another ground. The Division Bench, in Panduranga Rice Mill's case, followed an earlier judgment of a Division Bench of this Court in **Manepalli Venkataramana's case** (5-supra). These judgments are of no avail to the petitioner, as in the case on hand, no final order was passed by the Commissioner in revision, and he is not, therefore, precluded from seeking to revise the same order of the appellate authority, dated 19-6-2001, on another ground.

The A.P.G.S.T. Act does not prohibit, initiation of proceedings, to revise the order of the appellate authority, on another ground if the requirements of Section 20 are satisfied. In the case on hand, the respondent found not only that the first item relating to forfeiture of excess collection of tax was prejudicial to the interests of revenue, but also that the second item relating to set of tax of Rs.3,73,739/- required revision and as such issued show cause notice dated 01.03.2005, well within the period of limitation prescribed under Section 20(3) of the A.P.G.S.T. Act. It cannot therefore be said that the impugned show cause notice dated 01.03.2005 is without jurisdiction.

Challenge to the show cause notice dated 01.03.2005, therefore, fails and the writ petition is accordingly dismissed. It is open to the petitioner, to submit its objections in reply to the impugned show cause notice, within a period of 15 days from the date of receipt of a copy of this order. Objections, if any, filed within the aforesaid period, shall be considered by the respondent and orders passed on merits, without being influenced by any observations made in this order. No costs.

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B. SUDERSHAN REDDY, J

Date: .08.2005

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RAMESH RANGANATHAN, J

MRKR/ASP